IN THE UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	)	
	)	
	)	**Chapter 11**
ORMET CORPORATION, et al.	)	
	)	
	)	**Case No. 13-10334 (MFW)**
	)	
Debtors.	)	

OBJECTION OF THE UNITED STATES, ON BEHALF OF THE ENVIRONMENTAL PROTECTION AGENCY, AND THE STATE OF OHIO, ON BEHALF OF THE OHIO ENVIRONMENTAL PROTECTION AGENCY, TO THE DEBTORS' EMERGENCY MOTION OF OCTOBER 16, 2013 (Docket 677)

The United States, on behalf of the U.S. Environmental Protection Agency ("U.S. EPA"), and the State of Ohio, on behalf of the Ohio Environmental Protection Agency ("OEPA"), by and through the undersigned attorneys, hereby object to the above-referenced motion and state their objection as follows:

STATEMENT OF RELEVANT FACTS AND PROCEDURE

1. On February 25, 2013, the Debtors in the above-captioned bankruptcy filed a voluntary petition for bankruptcy relief under chapter 11 of the Bankruptcy Code.

2. On October 16, 2013, Debtors filed the above-referenced motion ("Debtors' Motion") seeking, *inter alia*, approval of a plan to winddown its businesses and provide releases for certain employees implementing the winddown and their lenders. However, as of Friday morning, October 25, 2013, Debtors have not even filed the plan with the details of the winddown they are proposing. The relief sought by Debtors' Motion could pose a risk to public health and safety by failing to provide for Debtors' continued compliance with environmental obligations under Federal and State law, as discussed below.

3. In 1995, one of the Debtors in this matter, Ormet Primary Aluminum Corporation ("Ormet") entered into a consent decree with U.S. EPA in the matter of *United States of America v. Ormet Primary Aluminum Corporation*, Civil Action Number C2-95-947 (S.D. Ohio 1995), as amended in 2009, under which it agreed to implement and maintain a Superfund remedy for the Hannibal Superfund Site.

4. Ormet was/is liable to U.S. EPA in connection with the Facility pursuant to Sections 106 and 107(a)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 and 9607(a)(1).

5. Ormet completed construction of the remedy in 1998, and has to date operated and maintained remedy components under U.S. EPA oversight, as required by the consent decree. On July 23, 2013, this Court ordered Debtors to "continue to perform their existing obligations under the Consent Decree. with the United States dated September 27, 1995, as amended by an Amended Consent Decree dated March 11, 2009 and entered in Civil Action No. C2-95-947 (D.D. Ohio), including continued operation of all Superfund remedy components at the Hannibal Smelter, including the Ranney well at or near the pumping rate of 1 mgd in order to maintain hydraulic capture of the groundwater plume, and the soil flushing treatment." Docket 535.

6. It is unclear from Debtors' Motion whether Debtors are seeking to reduce or curtail operation of the potlines at the Hannibal facility. It is unclear from Debtors' Motion whether Debtors intend to also shut down operation of a groundwater well critical to maintenance of the remedy at the Site (the "Ranney Well") or a soil flushing treatment.

7. Operation of the Ranney Well at or near a pumping rate of 1 mgd is required to maintain hydraulic capture of a contaminated groundwater plume. Because the Ranney Well provides non-contact cooling water to the potlines, U.S. EPA is concerned that shutting down some or all of the operating potlines could substantially affect the pumping rate of the Ranney Well.

8. In addition, it is not clear how the relief sought by Debtors' Motion would affect the continued operation of the soil flushing treatment, which is also needed to maintain operation of the remedy.

9. Discontinuation of environmental obligations under the consent decree could pose substantial risks to public health and safety. Moreover, because the plant portion of the site has not yet been significantly investigated, it may pose additional threats to public health and safety.

10. When Ormet shuts down the operation of its aluminum manufacturing facility, Ormet will need to comply with State of Ohio environmental laws, including State hazardous waste laws and rules set forth in Ohio Rev. Code Chapter 3734. and the rules adopted thereunder and State Cessation of Regulated Operations laws and rules set forth in Ohio Rev. Code 3752 and the rules adopted thereunder.

11. State Hazardous Waste compliance will require Ormet to remove and properly dispose, at a permitted and licensed hazardous waste facility, all the potline waste from the potlines, all hazardous waste in drum storage areas, and any other hazardous wastes stored at the facility. Ormet will then have to perform an environmental closure of the areas where hazardous wastes were stored.

12. State Cessation of Regulated Operations compliance will require Ormet to remove regulated substances, such as chemicals, fluids in vats, tanks, and equipment, and debris, from the facility, provide for site security, and make the necessary reporting to Ohio EPA regarding compliance.

13. Debtors also own an alumina refinery in Burnside, Louisiana that they are proposing to keep in hot idle status.

I. The Non-consensual Non-debtor Releases Sought in Debtors' Motion are Impermissible.

14. Debtors proposed Final Order provides, in pertinent part, that:

> Protected Persons (defined in the Motion as "including, without limitation, the Officers and Directors of the Debtors, along with members of the Creditors' Committee (solely in such capacity), the DIP Lenders (solely in such capacity) and the professional advisors to the Debtors, the Creditors' Committee and the DIP Lenders") are hereby released and exculpated from any and all Third Party Actions that are based upon any actions the Protected Persons have taken in good faith, and any and all actions that they have refrained, or will refrain, from taking in good faith, to develop, approve, implement and/or oversee the Winddown Plan. Any Third Party Actions related to the foregoing are hereby permanently enjoined pursuant to section 105(a) of the Bankruptcy Code.

Debtors' Proposed Final Order at Para. 6. Paragraph 6 of Debtors' proposed Interim Order contains similar language.

15. In *In re Zenith Electronics Corp.*, 241 B.R. 92, 111 (Bank. D. Del. 1999)(MFW), this Court considered the permissibility of non-consensual non-debtor releases in a plan of reorganization, and held that such releases may only be obtained with the affirmative agreement of the affected creditor. *Id. See also In re Washington Mutual, Inc.*, 442 B.R. 314, 352 (Bankr. D. Del.2011) (MFW) ("This Court has previously held that it does not have the power to grant a third party release of a non-debtor. . . Rather, any such release must be based on consent of the releasing party. . . ."); *In re Continental Airlines*, 203 F.3d 203, n. 11 (noting that "several of the Bankruptcy Courts in our Circuit have stated that non-debtor releases are permissible only if consensual, at least with respect to direct (as opposed to derivative) claims." (citing, *inter alia*, *Zenith*, 241 B.R. at 111).

16. As explained by this Court in *Washington Mutual*, "in evaluating releases, courts distinguish between the debtor's release of non-debtors and third parties' release of non-debtors . . . ." *Washington Mutual* at 346 (citing *In re Exide Techs.*, 303 B.R. 48, 71-74 (Bankr. D. Del. 2003)). Releases by non-debtors, such as those proposed here, are subject

to a more stringent affirmative consent standard. *Id.* at 352. In fact, in the context of a liquidation, as here, the rationale for denying non-consensual non-debtor releases is even more compelling, because in the context of a plan, the Bankruptcy Code affords extensive protections and disclosure requirements to creditors not present in this case. *See, e.g.*, 11 U.S.C. §§ 1121-1129.

17. Moreover, the proposed releases by non-Debtors' would encompass all environmental violations, including unknown future violations, relating to Debtors' facilities, precluding accountability for potential serious harm to public health and safety and the environment that could result from known contamination at the facilities. While the government does not often proceed against individuals, prosecutorial discretion must be preserved in order to maintain a deterrent effect.

18. This Court simply does not have authority to rewrite environmental laws that are otherwise applicable to the smelter facilities or immunize parties from having to comply with laws designed to protect public health and safety and the environment. As the Third Circuit has stated, "the equitable powers authorized by § 105(a) are not without limitation, and courts have cautioned that this section "does not 'authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity.'" *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 236 (3rd Cir. 2004) (citing *In re Aquatic Dev. Group, Inc.*, 352 F.3d 671, 680-81 (2nd Cir. 2003). *See also In re W.R. Grace & Co.*, 591 F.3d 164, 170 (3d Cir. 2009) ("While Section 105(a) of the Bankruptcy Code allows a bankruptcy court to issue any order necessary to carry out the provisions of the Code, it "does not provide an independent source of federal subject matter jurisdiction." (quoting *Combustion Eng'g*)).

19. Moreover, the Motion provides no factual basis or analysis whatsoever for this Court to evaluate whether the releases proposed by Debtors are appropriate under law.

There is not even any discussion at all as to the environmental compliance obligations or liabilities that the Debtors may be seeking this Court's blessing to avoid having to implement or comply with. There is also no discussion as to whether the past or future actions of the lenders create liability under CERCLA's lender liability, Section 101(20)(E),(F), or otherwise applicable environmental law.

20. Nor are "exculpations" that would effectively serve as releases from environmental law appropriate. The Third Circuit has held that if a Plan exculpation clause complies with Bankruptcy Code standards applicable to fiduciaries (Section 1103(c)), a creditor's committee, its members, and estate professionals may be exculpated for their actions in the bankruptcy case for violations of the Bankruptcy Code (excluding lenders and willful misconduct or gross negligence). *In re PWS Holding Corp.,* 228 F.3d 224, 246 (3d Cir. 2000). The court's decision does not extend, however, to exculpation in the context of environmental laws, which employ liability standards separate and distinct from the Bankruptcy Code or from Debtors' proposed "good faith" standard of liability.[1] See e.g., 42 U.S.C. § 9601(20)(E),(F). Debtors' proposed non-debtor exculpation would again encompass all environmental violations relating to Debtors' facilities, precluding accountability for potential serious harm to public health and safety and the environment that could result from known contamination at the facilities.

21. Debtors' Motion is also impermissible because it seeks pre-enforcement review for which there is no jurisdiction or waiver of sovereign immunity. *See e.g.*, 42 U.S.C. § 9613(h); *Mobile Oil v. EPA*, 959 F. Supp. 1318 (D. Colo. 1997); 11 U.S.C. § 106(a)(4) (bankruptcy orders against governmental units can only be issued if "consistent

[1] *E.g., United States v. CDMG Realty Co.*, 96 F.3d 706, 712 (3d Cir. 1996). The Third Circuit has held that environmental issues arising in bankruptcy cases require special consideration because they involve "conflicting statutory frameworks." *In re Grossman's Inc.,* 607 F.3d 114, 126 n.11 (3rd Cir. 2010).

with appropriate non-bankruptcy law applicable to such governmental units.").

II. Debtors' Winddown Plan Must Provide for Continued Compliance with Debtors' Environmental Obligations under Federal and State Law.

22. Because Debtors'winddown plan has still not been filed, U.S. EPA and OEPA have not been able to evaluate whether or to what extent the plan provides for compliance with environmental obligations. U.S. EPA and OEPA object to the inadequate notice and time to prepare for the hearing currently scheduled for Monday, October 28, at 3:00 EST and therefore request that the Court postpone the hearing. In the event the winddown plan does not provide for environmental compliance, including continued operations of the Ranney Well and soil flushing treatment, U.S. EPA and OEPA file this objection and request that the Court ensure that any order approving the motion provide for the performance of Debtors' environmental obligations.

Debtors must meet their environmental obligations in bankruptcy.

23. Debtors must comply with applicable environmental laws just like any other owner of environmentally contaminated property. *See Ohio v. Kovacs*, 469 U.S. 274, 285 (1985) (a debtor plainly may not maintain a nuisance, pollute the waters of the State or refuse to remove the source of such conditions). Indeed, cleanup obligations under environmental laws are not dischargeable in bankruptcy. *See In re Torwico Electronics, Inc,* 8 F.3d 146, 151 (3d Cir. 1993).

24. The Bankruptcy Code requires a Debtor to manage and operate property in its possession "according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound if in possession thereof." 28 U.S.C. § 959(b). Courts have held that "it is inescapable to avoid the conclusion that 28 U.S.C. § 959(b) requires a debtor to conform with applicable federal, state, and local law in conducting its business." *Norris Square*

Civic Ass'n v. Saint Mary Hosp., 86 B.R. 393, 398 (E.D. Pa. 1988) (emphasis added); *In re Old Carco* LLC, 424 B.R. 650, 658 (Bankr. S.D.N.Y. 2010) ("[A] trustee's effort 'to marshall and distribute' estate assets is subject to the governmental interest in public health and safety.").

25. The Supreme Court has recognized that this obligation extends to a debtor's performance of its environmental obligations. *See Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 507 (1986) ("[T]rustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."). In reaching its conclusion, the Supreme Court recognized that "Congress has repeatedly expressed its legislative determination that the trustee is not to have *carte blanche* to ignore nonbankruptcy law. Where the Bankruptcy Code has conferred special powers upon the trustee and where there was no common-law limitation on that power, Congress has expressly provided that the efforts of the trustee to marshal and distribute the assets of the estate must yield to governmental interest in public health and safety." *Id.* at 502; *see Texas v. Lowe (In re H.L.S. Energy Co.)*, 151 F.3d 434, 438 (5th Cir. 1998) (applying *Midtlantic's* mandate that a "bankruptcy trustee may not abandon property in contravention of a state law reasonably designed to protect public health or safety.").

26. Just as a debtor may not abandon property in contravention of nonbankruptcy law protecting public health and safety, a debtor likewise may not curtail operations at a manufacturing facility so as to create conditions in contravention of nonbankruptcy law protecting public and health and safety.[2]

27. Here, federal law, rooted in U.S. EPA's interest in promoting public health

[2] Section 959(b) applies to the "manage[ment] of property." 28 U.S.C. § 959(b).

and safety and embodied in the consent decree between Ormet and U.S. EPA and order by a United States District Judge, requires that the Debtors operate and maintain the Superfund remedy in place at the Facility.

28. Because the Debtors cannot abandon property or operate an estate in violation of an environmental law, a winddown plan that fails to provide for compliance with environmental obligations cannot be approved. *See Am. Coastal Energy*, 399 B.R. at 810.

CONCLUSION

For the foregoing reasons, this court should not approve Debtors' Motion absent provisions to ensure the Debtors' continued performance of their environmental obligations.

Dated: October 25, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2013, a true and correct copy of the foregoing was served via ECF.

/s Robert W. Darnell
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